



IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION

UNIVERSITY OF NORTH DAKOTA,

Plaintiff,

vs.

JAMES HARDIE RESEARCH PTY, LTD.,
an Australian Corporation,
JAMES HARDIE BUILDING PRODUCTS, INC.,
a Nevada Corporation,
JAMES HARDIE INT'L FINANCE B.V.,
a Netherlands Corporation,
certain FURNACE EQUIPMENT,
certain FURNACE EQUIPMENT DESIGNS,
certain FURNACE SPECIFICATIONS, and DOES
1-10,

Defendants.

JAMES HARDIE BUILDING PRODUCTS, INC.
and JAMES HARDIE INT'L FINANCE B.V.,

Plaintiffs,

vs.

ENERGY & ENVIRONMENTAL RESEARCH
CENTER,

Defendants.

Civil Action No.: A2-04-152
Honorable Ralph R. Erickson
Magistrate Judge Karen K. Klein

**UND/EERC'S RESPONSE TO THE
JAMES HARDIE PARTIES THIRD
AMENDED COMPLAINT**

Civil Action No.: A2-05-44

The University of North Dakota and its division, the Energy & Environmental Research Center ("UND/EERC"), respectfully submit this Memorandum in response to the James Hardie parties ("JH") Third Amended Complaint.

JH amended their Complaint pursuant to Federal Rule of Civil Procedure 15(a). "Defendants should not be required to file a new motion to dismiss simply because an amended pleading was introduced while their motion was pending. If some of the defects raised in the

original motion remain in the new pleading, the court simply may consider the motion as being addressed to the amended pleading.” 6 Charles A. Wright, Arthur R. Miller and Mary Kay Kane, Federal Practice and Procedure § 1476 (2d ed. Supp. 2005); see also Jordan v. City of Philadelphia, 66 F.Supp.2d 638, 641 n. 1 (D.C.Pa. 1999); Sun Co. v. Badger Design & Constructors, Inc., 939 F.Supp. 365, 367 n. 3 (D.C.Pa. 1996); Patton Elec. Co. v. Rampart Air, Inc., 777 F.Supp. 704, 712 (D.C.Ind. 1991).

On March 28, 2005, UND/EERC brought a motion to dismiss claims alleged in JH’s Second Amended Complaint. (See Defendant Energy & Environmental Research Center’s Notice of Motion and Motion to Dismiss Pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6) (“First Motion to Dismiss”) (originally filed in the United States District Court Central District of California Eastern Division)). Here, since Counts V and X of the Third Amended Complaint suffer from the exact same deficiencies that are addressed in UND/EERC’s First Motion to Dismiss, the Court should allow the First Motion to Dismiss to be considered as addressing the Third Amended Complaint. See Jordan, 66 F.Supp.2d at 641 n. 1. In addition, although in JH’s Third Amended Complaint, JH amended some of their claims to assert North Dakota causes of action rather than California causes of action, JH’s unfair competition claim and N.D.C.C. § 9-10-01 claim must be dismissed because the Court lacks jurisdiction over these causes of action, a deficiency that was addressed in UND/EERC’s First Motion to Dismiss.

Moreover, on July 8, 2005, JH served UND/EERC with their Answer and Counterclaim to UND/EERC’s Complaint. (See Answer and Counterclaims of James Hardie Research Pty, Ltd.; James Hardie Building Products, Inc.; and James Hardie Int’l Finance B.V. to Verified Complaint of University of North Dakota). On July 22, 2005, in response to JH’s Counterclaims, UND/EERC brought a motion to dismiss JH’s unfair competition counterclaim

and N.D.C.C. § 9-10-01 counterclaim. (See generally UND/EERC's Memorandum of Law in Support of its Motion to Dismiss ("Second Motion to Dismiss")). Because these same claims were also asserted in JH's Third Amended Complaint, and the claims suffer from the exact same deficiencies that are addressed in UND/EERC's Second Motion to Dismiss, UND/EERC would refer the Court to the Second Motion to Dismiss as addressing the Third Amended Complaint.

Therefore, UND/EERC will not file an answer until the Court rules upon UND/EERC's First Motion to Dismiss and Second Motion to Dismiss. UND/EERC preserves all defenses and affirmative defenses.

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